

STATE OF CALIFORNIA

**Energy Resources
Conservation and Development Commission**

In the Matter of:) **Docket No. 97-AFC-1**
)
Application for Certification)
for the High Desert Power Project)
_____)

**RESPONSE OF COMMISSION STAFF TO
COMMITTEE SCHEDULING ORDER**

I. Introduction

On January 29, 1998, the Committee assigned to preside over this proceeding issued a scheduling order (Scheduling Order). The Scheduling Order has two parts. The first part establishes certain dates for various submissions anticipated during the course of the proceeding. The second part directs parties to address the following three issues:

- A. Decommissioning/Closure: Each party shall discuss the scope of decommissioning/closure requirements appropriate for a merchant facility such as the High Desert project. If the party believes such requirements are not appropriate, it shall specify the reasons and legal authority supporting such position. If, on the other hand, a party believes such requirements should apply, it shall generally specify the nature and extent of such requirements and shall recommend methods for developing and incorporating such requirements in this case.

- B. Transmission: The parties shall identify all entities which must consider and approve any electrical transmission agreement, transmission system interconnection, and transmission system modification which may be required for the approval of this project. The responses shall discuss the relationship among these entities, and shall specify the legally identifiable roles and responsibilities for each entity. To the extent these matters are as yet unresolved, the parties shall explain any steps which are currently being taken, or should be taken, to resolve them. Finally, the parties shall specify which entities, if any, must make recommendations and/or determinations within the Commission's licensing process, and shall indicate whether such recommendations/determinations are necessary in order for the Commission to take final action on the proposed project.

- C. Project Configuration: The parties shall discuss whether the Commission may approve a project which has multiple configurations. Each party shall provide legal authority for its position on this matter. Parties shall address any effects such multiple configurations may have on the Commission's licensing process and on matters of concern under the California Environmental Quality Act [Pub. Resources Code § 21000 et seq.] including, by not necessarily limited to, the topics of "project description" and "alternatives". Parties should also address the practical concerns involved in analyzing a proposed project with multiple configurations. Finally, assuming the Commission may approve the project with multiple configurations, the parties shall discuss any further appropriate actions the Commission would be required to take once the final configuration is selected.

II. Analysis

A. Decommissioning/Closure

The Scheduling Order requests parties to discuss whether decommissioning/closure requirements are appropriate for a merchant facility such as the High Desert project, and, if such requirements are appropriate, to generally specify the nature and extent of such requirements. Staff believes that whether decommissioning requirements are necessary will be determined by the analysis done by the parties and the attendant findings the Committee and the Commission make about this project. If the Commission finds that significant adverse environmental effects could result from closure, it must ensure that they will be mitigated. In the interest of providing complete information, staff will present a discussion about the perceived problem, examples of problems faced by the Commission, a description of possible remedies, and finally a discussion of staff's approach for the High Desert project.

1. The Problem: There are actually two situations that staff is concerned about when addressing decommissioning/closure. The first situation is that of the "unexpected" closure. Examples of this type of closure are: cessation of power generating activities resulting from the bankruptcy or other financial problems of the developer/owner; severe mechanical failure of the powerplant leading to a long-term shutdown; or shutdown as a

result of earthquake, flooding, or other "acts of God". These closures are not a result of planned activities by the developer/owner.

Staff's concern about these unexpected closures is for public health and safety and environmental protection. Staff believes that in all such cases there should be assurance that all toxic and hazardous materials on the site will be handled, stored or removed safely in order to prevent any accidents that will adversely affect the public or the environment. Also, staff believes that all reasonable steps should be taken to secure the equipment and grounds to prevent injury to the public, and to ensure that public agencies will not have to expend any funds to carry out those activities.

The second situation is that of the planned cessation of power generating activities at the end of the useful life of the facilities or due to the end of the planned operational timeframe. This type of closure has typically been called "decommissioning." Staff's concern about end-of-useful-life closures also encompasses public health and safety and environmental protection issues. Although the Commission currently has no law or regulation requiring a certain level of environmental restoration upon the termination of a project, staff believes that a decommissioning plan should be approved by the Commission. This approval should include an analysis of closure alternatives, including site restoration, if appropriate.

2. Example of the problem: The Commission has experience with a project operator filing a bankruptcy action in Federal Court. That action led to concerns about the status of eight powerplants from a public health and safety perspective. Although the Commission's concerns were alleviated by the project owners' timely, responsible and responsive actions, there was still one project that began construction and was stopped due to the bankruptcy. Currently, that project remains fenced off, but there are concrete foundations and pillars left as an eyesore and potential nuisance on the site. There are no viable project owners for that particular project due to the bankruptcy so there is no

avenue of financial recourse should a government agency want to take action to clean up that site.

The Commission also recently provided partial funding in the amount of \$1.5 million for the closure of geothermal wells as a result of the landowner's bankruptcy and subsequent failure to properly close the wells. That action has also served to heighten the Commission's awareness about what happens to a project site abandoned by project owners due to financial problems.

3. Possible remedies: Staff will present a few of the myriad possible remedies here for information purposes only. What staff believes is appropriate for the High Desert case is presented in section 4 infra. Staff is anticipating a rulemaking proceeding soon that will address the decommissioning/closure requirements in more detail.

In many cases, it may be impossible to find the appropriate legal owner to respond to an order for removal and clean-up of toxic and hazardous materials. Because it is likely that most of the owner entities that will bring an Application for Certification to the Commission will be limited partnerships, it could be legally impossible or very difficult to obtain funds from the limited partners to provide the funds necessary to protect the public health and safety in a timely manner. Even if there is a "stable" corporate entity, there are no guarantees that any particular corporation will exist at any particular time in the future.

Staff believes that there are several financial instruments that may be helpful in ensuring performance or that may provide the funds for clean up, should it become necessary. Those instruments include insurance policies, bonds, cash on deposit, or letters of credit. Each has its own advantages and disadvantages.

4. Staff recommendation for the High Desert project: As indicated previously, Staff looks forward to a rulemaking proceeding in the near future that will address this issue. For this case, staff is planning on taking the following action. First, staff plans to analyze project closure as part of its technical analysis of the AFC in individual technical areas as appropriate. Staff's analysis will be based on current laws, ordinances,

regulations, and standards (LORS) that protect public health and safety. If a feature or component of the project, because of current LORS, must be treated in a certain manner at project closure, staff will write a condition of certification to require that treatment.

In addition, staff proposes to do an informative screening analysis of possible adverse environmental impacts resulting from any project features which staff believes may have a potential for significant environmental impact at the end of the project's useful life. Staff plans to include a discussion of this analysis in its testimony, and, instead of imposing conditions for closure related to that specific feature, may require that those project features be addressed in the draft closure plan that is submitted at the end of the project's useful life. The reason for this is that the surrounding environment may be different in the future when the project closes and it would be inappropriate to impose conditions on an uncertain future. Staff intends for its testimony to serve as notice to the applicant and subsequent project owners about staff's concerns regarding end-of-useful-life closure for that specific project feature.

Staff recommends that the analysis for the whole project's closure impacts be done at the end of the project's useful life as part of a closure plan review and approval process. Staff plans to conduct an analysis of the need for financial assurance for removal of hazardous and toxic materials from the site in the case of unexpected closure or facility abandonment. Staff does not plan to conduct any other financial analysis unless the Committee sees a need for additional information.

If staff's analysis indicates a need for financial assurance based on the quantities or types of substances planned to be on-site, staff will propose a condition of certification recommending a dollar amount for the financial assurance in the form of a bond, an insurance policy, or special deposit account. Staff, in appropriate technical areas (e.g., water resources), will include a discussion of other agency bonding requirements which affect the proposed project. In particular, this discussion will include a description of the specific project features that the other agency's bond requirements affect and what is

covered by the bond. Staff anticipates proposing a general condition which will require the project owner to submit a draft closure plan for Commission review and approval at least 12 months prior to start of closure activities.

B. Transmission

The Scheduling Order requests that parties identify all entities which must consider and approve any aspect of interconnection of the High Desert project to the transmission system, as well as the legally identifiable roles and responsibilities of each entity. In addition, parties are requested to specify which of those entities, if any, must make recommendations or determinations within the Commission's licensing process, and whether such recommendations or determinations must be completed prior to a Commission decision on the project. Finally, parties are asked to explain any steps which are currently being taken, or should be taken, to address the interconnection process in this case.

1. Energy Commission: The Commission's certification of a proposed site and related facilities is in lieu of any permit, certificate, or similar document required by any state, local or regional agency or federal agency to the extent permitted by federal law. (Pub. Resources Code, § 25500) Commission certification of any project encompasses the proposed thermal powerplant and all related facilities, including any transmission upgrades that will be constructed up to the point of the project's junction with the interconnected transmission system. (Pub. Resources Code, §§ 25110, 25120, 25500)

Moreover, under the California Environmental Quality Act (CEQA), the Commission must conduct an environmental review of the "whole of the project", which may encompass facilities not included in the Commission's license. (Cal. Code Regs., tit. 14, § 15378) As a result, the Commission must consider environmental effects created by any transmission system upgrades past the point of the project's junction with the interconnected transmission system that are needed as a result of the project. (California Public Utilities Commission v. California Energy Resources Conservation and Development Commission (1984) 150 Cal.App.3d 437, 197 Cal.Rptr. 866) Finally, the

Commission must make findings as to whether the proposed project conforms with applicable state, local or regional standards, ordinances, or laws, including standards adopted to ensure that interconnection with the transmission system does not impair system reliability. If the Commission identifies a nonconformity, it cannot certify the facility unless it first determines that the facility is required for public convenience and necessity, and that there are not more prudent and feasible means of achieving such public convenience and necessity, and in no event can it certify a project that is not in conformance with applicable federal standards. (Pub. Resources Code, § 25525)

2. ISO, FERC, Transmission Owner: The Federal Power Act (FPA) (16 U.S.C.A., § 791 et seq.) gives primary jurisdiction over interconnection to the Federal Energy Regulatory Commission (FERC). In exercise of its authority, FERC has adopted regulations requiring all owners of transmission to offer non-discriminatory access to sellers of electric energy in interstate commerce. According to FERC,

Transmission owners can discriminate by restricting access to, or restricting expansion of, transmission facilities. . . . To ensure that all participants in wholesale electricity markets have non-discriminatory open access to the transmission networks, transmission owners must offer non-discriminatory open access transmission . . . services to wholesale sellers and purchasers of electric energy in interstate commerce. (FERC Stats & Regs. § 32,514 at 33,078)

As a result, the High Desert applicant has a right to interconnect its project with the Southern California Edison transmission system and does not need a permit or certificate from the CEC, the ISO or FERC to create that right. However, it must interconnect in a way that does not adversely affect system reliability.

In 1996, the Legislature adopted legislation designed to implement deregulation of the electric industry. (Stats. 1996, ch. 854) As part of that effort, the Legislature created the Independent System Operator (ISO) and directed it to “ensure efficient use and reliable operation of the transmission grid consistent with achievement of planning and operating reserve criteria no less stringent than those established by the Western Systems Coordinating Council and the North American Electric Reliability Council.” (Pub. Util.

Code, § 345)¹ The ISO is thus responsible for ensuring system reliability and must determine both the standards necessary to ensure that interconnection doesn't adversely affect transmission system reliability and the High Desert project's conformity with those standards.

Because the ISO has responsibility over matters that are within the jurisdiction of the Federal Energy Regulatory Commission (FERC), the ISO requested FERC to approve various tariffs and related agreements in its Phase II filing, dated March 31, 1997. That filing included a Transmission Control Agreement (TCA) into which the ISO proposes to enter with each transmission owner. The TCA contains the procedures that the Transmission Owner and the ISO will follow in the High Desert case to ensure that the High Desert interconnection does not impair system reliability.

The TCA states that Transmission Owners and the ISO shall allow interconnection to the ISO controlled grid in a non-discriminatory manner. (§ 10.2.1)² The Transmission Owner is responsible for developing, in consultation with the ISO, technical standards for interconnection, consistent with applicable reliability criteria and for accepting and processing interconnection requests in a non-discriminatory manner in accordance with its tariffs and procedures. (§§ 10.3.1, 10.3.3) The Transmission Owner is also responsible for entering into a System Impact Agreement and a Facilities Study Agreement with the entity requesting interconnection and for ensuring that all necessary agreements have been fully executed prior to accepting Interconnection facilities for operation. (§§10.3.3(iii), 10.3.5)³

The TCA also imposes requirements on the ISO. The ISO is responsible for developing consistent interconnection standards, reviewing Transmission Owners' procedures for processing requests and interconnection requests and studies of

¹ The ISO is a state-chartered non-profit public benefit corporation whose decisions are subject to review by the Oversight Board.

² This requirement is also reflected in the Transmission Owner's tariff submitted to FERC on March 31, 1997. § 8.1 of that document states that the Transmission Owner shall, at the request of a third party, interconnect its system to the generation, subject to requirements applicable to the construction of any new facilities necessary for the interconnection.

³ The entity requesting interconnection may be required to pay for the necessary studies. (§ 10.2.3)

Transmission Owners, and providing comments on the studies to Transmission Owners and Applicants. (§§10.4.1, 10.4.2)

On January 21, 1998, the ISO Grid Planning Procedures Work Group reached agreement on a coordinated planning process for the ISO-controlled grid. According to the document describing the agreed-upon process, the Transmission Owner has 20 business days after receiving an interconnection request to determine the need for a System Impact Study and, if one is needed, to develop a Study Agreement. Under a Study Agreement, the Transmission Owner is obligated to conduct a System Impact Study within 60 business days. If , based on the Study, it determines that additions are necessary, it then has 15 business days to develop a Facilities Study Agreement and 10 business days to execute the Agreement. The Facilities Study Agreement defines the scope, content, assumptions and terms of reference for the study, and the estimated time required to complete the study. The time required to complete the final study is, thus, left to negotiated terms.

2. Staff Recommendation for the High Desert Project: The uncertainty in this case arises from the unsettled timing of Southern California Edison’s interconnection studies and the ISO’s review of the studies and ultimate determination as to whether system upgrades will be needed as a result of this project. The challenge is to coordinate the ISO’s determinations, which will be based on Edison’s interconnection studies, with the Commission’s decision on the project. Timely coordination should allow for the Commission’s decision to contain a complete description of the entire project, including transmission system upgrades, if any, beyond the junction with the interconnected transmission system, an analysis of the entire project’s environmental impacts, identification of all applicable reliability standards, and a basis on which to make findings regarding the conformity of the proposed project with applicable standards.

Because the ISO is authorized by statute to “ensure efficient use and reliable operation of the transmission grid consistent with achievement of [certain] planning and operating reserve criteria”, the Committee may rely on an ISO determination in making its findings regarding conformity with applicable reliability criteria. (Pub. Util. Code, § 345) Accordingly, staff recommends that the Committee request the ISO to identify for the

record those reliability standards or criteria applicable to the project and to provide a statement about whether the High Desert project is likely to comply with the standards or criteria. Such a statement will provide the Commission with a sound basis for the required findings regarding conformity.

If the ISO is unable to provide the determination prior to the Commission's decision on the project, the Commission must decide whether to postpone the issuance of a final decision until that determination is part of the record, or to render a decision on the project based on other evidence in the record regarding conformity. This evidence could be provided by staff, the Applicant or other parties. However, if the Commission issues a decision without the ISO's determination, it may be based on assumptions about interconnection that are eventually shown to be in error and may not accurately depict the extent of the entire project. Because the precise interconnection requirements may include system upgrades that the Commission is obligated to review under CEQA, the staff recommends that any Commission decision not based on a final ISO determination include a condition requiring that the applicant provide the final interconnection agreements to the Commission for its review, and for possible additional environmental analysis and modification of the Decision, prior to the commencement of construction.

Staff has recently begun discussions with the ISO to clarify the ISO's and the participating transmission owners' responsibilities regarding interconnection studies requested by AFC applicants. Ultimately, staff seeks to coordinate the roles of the ISO and transmission owners with the schedule and objectives of all AFC proceedings. We have suggested to the ISO that we consider a memorandum of understanding after we better understand and define our respective responsibilities, roles, and schedules. Because the timing of the interconnection studies appears to be critical to a timely and complete decision on an AFC, staff has even begun considering whether to propose amendments to the data requirements for an application for certification. In the meantime, however, we plan to continue discussions with the ISO to determine how best to coordinate the responsibilities of the ISO and transmission owners in this and subsequent cases.

C. Project Configuration

1. Applicable Legal Requirements: As stated above, the Commission's decision on an Application for Certification (AFC) is in lieu of any permit, certificate, or similar document required by any state, local or regional agency or federal agency to the extent permitted by federal law. (Pub. Resources Code, § 25500) A decision approving an AFC must contain findings addressing health and safety, environmental quality, conformity with air quality standards, conformity with the Commission's integrated assessment of need, and other matters. The Commission cannot certify any facility that does not conform with any applicable state, local or regional standards, ordinances, or laws, unless the Commission first determines that the facility is required for public convenience and necessity, and that there are not more prudent and feasible means of achieving such public convenience and necessity. (Pub. Resources, § 25525)

In addition to the requirements of the Warren-Alquist Act (Pub. Resources Code, § 25000 et seq.), the Commission is also subject to the requirements of CEQA. As the Lead Agency for the project, the Commission is responsible for completing an environmental evaluation and documentation of any project which it certifies. (Pub. Resources Code, §§ 21067, 25519(c), Cal. Code Regs., tit. 14, § 15367) Although the Commission's site certification program has been certified by the Resources Agency, the certification exempts the Commission only from the requirement to prepare an EIR; all CEQA policies and other provisions are applicable. (Pub. Resources Code, § 21080.5, Cal. Code Regs., tit. 14, § 15251)

CEQA policies are numerous and include encouragement of public participation, early environmental review, and integration with other planning and environmental procedures. CEQA also imposes substantive requirements, directing agencies to "deny approval of a project with significant adverse effects when feasible alternatives or feasible mitigation measures can substantially lessen such effects." (Sierra Club v. Gilroy City Council (1990) 222 Cal.App.3d 30, 41, 271 Cal.Rptr. 393, 398) If the Commission determines that the project will create significant adverse effects and that mitigation or alternatives that mitigate those effects are either unavailable or infeasible, it may approve the project provided it finds that the project benefits rendered these effects acceptable.

(Pub. Resources Code, § 21081, Cal. Code Regs., tit. 14, §§ 15043, 15093, Cal. Code Regs., tit. 20, § 1755) The Commission’s environmental review must encompass the “whole of the project” in its proceeding, (Cal. Code Regs., tit. 14 § 15378) and may include the construction or operation of facilities that are outside of the Commission’s licensing authority, but are nonetheless part of the High Desert project. Similarly, the Commission must consider whether the project, in conjunction with other related past, present or reasonably foreseeable future projects, will contribute to any significant cumulative effects. (Cal. Code Regs., tit. 14, § 15130)

2. Staff Recommendation for the High Desert AFC: The applicant submitted an AFC for a “simple-cycle or combined-cycle power plant project of approximately 700 MW.” (App. 1.0-1) The three specific configurations contained in the AFC are five combustion turbine generators operating in simple-cycle mode, producing 832 MW, three combustion turbine generators operating in combined-cycle mode, producing 720 MW, and two combustion turbine generators operating in combined-cycle mode, producing at 678 MW. Although the project location, water source, and natural gas supply are the same for all three configurations, there is little debate that the different configurations have the potential to create different environmental impacts. For example, one configuration uses considerably less water than the others. Similarly, the air emissions of all three configurations are different. The questions raised by the Committee’s Scheduling Order concern the effect these differences have on the Commission’s authority and responsibilities in processing this application.

Specifically, the Committee asked parties to discuss whether the Commission may approve a project which has multiple configurations, and to provide supporting legal authority. The Committee asked parties to specify any effects the multiple configurations may have on the Commission’s licensing process and on “matters of concern” under CEQA. The Committee asked parties to address the practical concerns involved in analyzing a proposed project with multiple configurations, and any further Commission action that may be required once the final configuration is selected.

To begin this analysis, staff turned to the Warren-Alquist Act to determine the required components of a Commission decision granting an AFC. For the High Desert project, these include the following:

- o specific provisions relating to the manner in which the facility is to be constructed and operated to protect environmental quality and assure public health and safety, (Pub. Resources Code; § 25523(a))

- o findings about compliance of the proposal with public safety, air, and water standards, and other relevant local regional, state and federal requirements. The Commission cannot find that the facility complies with applicable air standards unless the local air district certifies that all required offsets for the facility have been identified and will be obtained prior to the Commission's decision to grant the AFC. (Pub. Resources Code, § 25523(d))

- o a finding that the facility conforms with the Commission's integrated assessment of need adopted pursuant to Pub. Resources Code section 25308; (Pub. Resources Code, § 25524)

- o if the facility does not comply with any applicable state, regional, or local requirement, a Commission determination that the facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving such public convenience and necessity. (Pub. Resources Code, § 25525)

In addition, the Commission's Site Certification regulations (found at Cal. Code Regs., tit. 20, § 1701 et seq.) contain requirements for the Presiding Member's Proposed Decision, which is the basis of a Commission decision granting an AFC. Although these requirements are more detailed than those contained in the Warren-Alquist Act, they address the same issues and impose no significantly different requirements. (Cal. Code Regs., tit. 20, §§ 1751 - 1752.2) The regulations also contain requirements for the

Commission decision itself, incorporating those specified in the Warren-Alquist Act as well as the findings required by the California Environmental Quality Act. (Cal. Code Regs., tit. 20, § 1755)

The first question that must be answered to respond to the Scheduling Order is whether the Commission can comply with the licensing requirements contained in the Warren-Alquist Act in a situation in which the AFC includes multiple configurations. Staff believes the answer to this question is yes. Staff is conducting the same level of analysis for each of the three configurations and will present, both by technical area and configuration, environmental consequences that are identical regardless of configuration, and those consequences that are not identical. Staff will conduct the same exercise for mitigation measures, and will perform an alternatives analysis that compares each of the three configurations to various alternatives. Our preliminary analysis indicates that any differences among the analyses of the three configurations will stem from the following:

- o Two configurations will require the construction of a water pipeline; the third will not;

- o The requirements imposed on the project's interconnection with SCE's transmission system, including potential construction of transmission system upgrades, may vary among configurations;

- o Two configurations will require cooling towers and concomitant water availability; the third will not;

- o The three different sizes being proposed, as well as the use of different equipment, will create important differences in air emissions among the three configurations.

Staff believes, that it should be possible to conduct an analysis which accommodates the different configurations and allows the Commission to make a legally sufficient decision that addresses all three configurations.

The next question that must be addressed in response to the Scheduling Order is whether CEQA imposes any requirements different from or additional to those in the Warren-Alquist Act as a result of multiple configurations. The only substantive CEQA requirements are reiterated in the Commission's regulations specifying findings necessary for a Commission decision granting an AFC and are discussed in the previous section of this brief. However, even though the Commission's licensing program has been certified by the Resources Agency, it is still required to comply with all the policies and provisions from which it has not been specifically exempted. (Environmental Protection Information Center v. Johnson (1985) 170 Cal.App.3d 604, 216 Cal.Rptr. 503, Sierra Club v. State Board of Forestry (1994) 7 Cal.4th 1215, 32 Cal.Rptr.2d 19) Staff now examines whether any of these policies and requirements affect the analysis required for the High Desert AFC.

Underlying staff's discussion is a focus on the fundamental purpose of CEQA. The statute itself states that the purpose of an environmental review is to "provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project". (Pub. Resources Code § 21061) The Supreme Court has stated that the purpose of CEQA is "to compel government at all levels to make decisions with environmental consequences in mind." (Bozung v. Local Agency Formation Commission (1975) 13 Cal.3d 263, 283, 118 Cal.Rptr. 249, 262) And, "the EIR process protects not only the environment but also informed self-government. (Laurel Heights Improvement Association of San Francisco v. Regents of the University of California (1988) 47 Cal.3d 376, 392, 253 Cal.Rptr. 426, 431)

There is nothing inherent in multiple configurations that makes a sufficient CEQA process unavailable. As long as CEQA's fundamental objectives are met, any number of project variations can be reviewed. This was the case in Sacramento Old City Association v. City Council of Sacramento (1991) 229 Cal.App.3d 1011, 280 Cal.Rptr. 478, in which the City of Sacramento proposed to expand its Convention Center. The City listed the expansion as the project objective and put forward five design proposals of

different sizes and configuration. For each alternative, fourteen subject areas were evaluated. Each subject area within the various alternatives were analyzed to identify any potential significant effects and potential mitigation measures. The cumulative impacts of the various alternatives were determined by considering the effects of each alternative together with the effects with other reasonably foreseeable future projects.⁴

Staff proposes to conduct a similar analysis in this case and believes that all of the fundamental objectives of CEQA can be met during the Commission's consideration of the High Desert AFC. First, CEQA requires a consistent and accurate project description. "An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." (County of Inyo v. City of Los Angeles (1977) 71 Cal.App.3d 185, 193, 139 Cal.Rptr. 396, 401) Staff believes that the Applicant has described all three configurations with sufficient specificity that "affected outsiders and public decision-makers [may] balance the proposal's benefits against its environmental costs, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the 'no project' alternative) and weigh other alternatives in the balance." (County of Inyo, supra, at pp.192-193)

CEQA also requires the Commission to identify impacts, including cumulative impacts, emphasizing those effects that are the most significant and the most likely to occur. (Sierra Club v. Sate Board of Forestry (1994) 7 Cal.4th 1215, 23 Cal.Rptr.2d 19) If any significant impacts are identified, the Commission must then consider and adopt feasible mitigation measures to substantially lessen or avoid otherwise those impacts. (Pub. Resources Code § 21002) Staff's analysis will identify the potentially significant effects of each of the three configurations and identify mitigation measures to lessen those effects. Any impacts or measures which cannot be identified due to the applicant's inability to provide the necessary level of detail will also be identified by staff.⁵

⁴ This case was challenged on grounds unrelated to this discussion.

⁵ This is no different from the situation in which insufficient detail is available to complete an analysis on a single project. In either situation, the Commission has the authority to deny the project, or to condition approval on review of the issue when the level of detail necessary to complete the analysis is available.

Staff anticipates that the potential effects of the three configurations will be identical for many technical areas. As a result, the mitigation measures staff recommends for those impacts are likely to be identical as well. In those technical areas for which the impacts may be different, such as air quality, water resources, and visual resources, staff will recommend mitigation specific to each configuration. The result of staff's analysis will be a set of mitigation measures that will ensure that each configuration will not create any significant impacts. If there are configurations that create impacts that are infeasible to mitigate, staff will identify whether there are feasible alternatives that mitigate those impacts.

CEQA requires the Commission to set forth alternatives to the proposed project. (Pub. Resources Code § 21002) Alternatives serve the same function as mitigation measures -- they are options the Commission may consider to avoid any of the significant impacts identified during the review process. Staff will specify several alternatives to the project that are designed to achieve the basic objectives of the project, including different sizes, different locations, as well as the no project alternative. Staff will then compare each of the project configurations to these alternatives, focusing on significant impacts identified for any of the configurations.

Finally, CEQA requires the Commission to provide meaningful opportunities for public review and comment. Staff cannot identify any feature of the High Desert AFC that will interfere with that outcome. The Commission's siting process promotes public participation by allowing members of the public to become parties, providing a Public Advisor to assist members of the public in participating in the licensing process, incorporating a strict ex parte rule, and requiring notice for all workshops, meetings, and hearings. Staff believes that the public's right to review and comment on the analysis of all parties will be amply protected.

Of course, the Committee and the Commission will consider not only staff's analysis and recommendations, but those of the applicant and other parties. We recognize that the Commission may reach a different conclusion about project impacts and appropriate mitigation measures than staff; however, staff's analysis will contain a sufficient basis for the Commission to make a decision on the High Desert AFC that

complies with both the requirements of the Warren-Alquist Act and the policies of CEQA. Regardless of whether the Commission ultimately accepts each of staff's conclusions and recommendations, staff encourages the Commission to adopt a decision that addresses all environmental issues and contains all necessary findings for each of the three proposed configurations.

There is a related question, which, although not clearly before the Committee at this time, has been raised at various times in this proceeding. That question concerns whether the Commission can issue a license for a generic facility; i.e., a license allowing the construction of a project for which no specific size or equipment is identified, but prohibiting any impacts greater than some yardstick identified in the license. Staff believes that the answer to this question is an unequivocal no. The required contents of the Commission decision as well as the provisions of CEQA prohibit the Commission from licensing a project without knowing what the project is. Without some information about the project, the Commission cannot identify the likely impacts of the project, establish specific provisions to protect environmental quality and assure public health and safety, and make findings about the compliance of the proposal with public safety, air, and water standards, and other relevant local regional, state and federal requirements. Stated another way, the Commission must grant a license for a project, not a maximum level of impacts.

Staff notes that projects can be modified post-certification without Commission approval when there is no possibility that the modification will have a significant effect on the environment, result in the change or deletion of a condition of certification, or result in non-compliance with any applicable legal requirement. However, even if no Commission approval is required, staff review of the proposed change is. (Cal. Code Reg., tit. 20, § 1769) Staff is also aware that it is acceptable for an agency to ultimately approve only a portion of a project analyzed in an EIR. (Dusek v. Anaheim Redevelopment Agency (1986) 173 Cal.App.3d 1029, 219 Cal.Rptr. 346) However, both these situations involve projects that are modified after completion of a full review, such that the agency has a basis for determining whether to allow activities not identical to those previously analyzed.

That is far different from approving a project lacking an identification of size or equipment and merely specifying maximum allowable impacts.

Notwithstanding those limitations, staff agrees that a Commission decision on the High Desert project need not identify each piece of equipment that will be used or the exact mode of operation. And, although it is not easy to identify a “bright line” that indicates the level of specificity necessary for a Commission decision, the staff recommends that the Commission focus its consideration of this issue on those features of the project which it believes are relevant to its decision. In other words, if a change to a specific feature could affect the Commission’s decision on the project, the Commission should either require that feature to be specifically identified prior to its decision or require that final specification of the feature be brought back before the Commission prior to construction or operation of the facility.

In conclusion, staff encourages the Committee to consider the three configurations presented in the AFC and decide whether to approve one, two, or all three as alternatives to each other. Staff recommends that the Commission require the applicant to inform the Commission as to which configuration it ultimately decides to construct, and to bring any changes to that configuration back to the Commission in accordance with the Commission’s post-certification amendment procedures. (Cal. Code Regs., tit. 20, § 1769) Similarly, if the Commission issues a decision without identifying certain pieces of equipment or a specific mode of operation, it should specify those details that must be brought back to the Commission for staff review when the applicant finalizes the project design.

IV. Conclusion

In conclusion, staff encourages the Committee to resolve the issues raised in its Scheduling Order in the following manner:

With respect to decommissioning, staff is planning to analyze project closure as part of its technical analysis of the AFC in individual technical areas as appropriate. Staff’s analysis will be based on current laws, ordinances, regulations, and standards. In addition, staff proposes to do an informative screening analysis of possible adverse environmental

impacts resulting from any project features which staff believes may have a potential for significant environmental impact at the end of the project's useful life. Staff plans to include a discussion of this analysis in its testimony, and, instead of imposing conditions for closure related to that specific feature, may require that those project features be addressed in the draft closure plan that is submitted at the end of the project's useful life. Staff anticipates proposing a general condition which will require the project owner to submit a draft closure plan for Commission review and approval at least 12 months prior to start of closure activities.

Finally, staff plans to conduct an analysis of the need for financial assurance for removal of hazardous and toxic materials from the site in the case of unexpected closure or facility abandonment. If staff's analysis indicates a need for financial assurance based on the quantities or types of substances planned to be on-site, staff will propose a condition of certification recommending a dollar amount for the financial assurance in the form of a bond, an insurance policy, or special deposit account.

With respect to review of the project's transmission system effects, staff recommends that the Committee encourage the ISO to provide its identification of the standards that will apply to the interconnection of the High Desert project and its conclusions about the project's conformity with those standards. If the ISO is unable to do so, the Committee will need to determine whether it has sufficient information to make an affirmative finding at the conclusion of evidentiary hearings. If it does, it may certify the project, although staff recommends that if an affirmative finding is based on evidence other than an ISO determination, the decision include a condition requiring that the applicant provide the final interconnection agreements to the Commission for its review and possible additional environmental analysis and modification of the Commission decision. If necessary, the Commission staff will conduct a review of the environmental effects of the construction and operation of any transmission system upgrades and provide recommendations for Commission action prior to the commencement of construction.

Finally, with respect to project configuration, staff recommends that the Commission address each of the three configurations proposed by the High Desert applicant. Staff's analysis will be conducted with the objective of providing a basis for a

Commission decision that identifies impacts, appropriate mitigation and alternatives for each configuration. Regardless of whether the Commission ultimately accepts each of staff's conclusions and recommendations, staff encourages the Commission to adopt a decision that addresses all environmental issues and contains all necessary findings for each of the proposed configurations. Similarly, if the Commission issues a decision without identifying certain pieces of equipment or a specific mode of operation, it should specify those details that should be brought back to the Commission for staff review when the applicant finalizes the project design.

Dated: February 27, 1998

Respectfully submitted,

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